

Gender Trouble(s), or: Anxiety about Gender Authenticity in Legal Discourse

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This presentation aims to apply the framework of anxiety culture to the production and application of gender norms. Its main focus will be on legal judgments concerning transgender rights, based on two assumptions. The first is that the law as an institutionalised social practice will reflect broader socially and discursively constructed anxieties; however, it will often hide them behind the ostensible objectivity of legal (and especially judicial) reasoning. Overcoming anxiety culture in the legal context thus requires that it first be laid bare. The second assumption is that cases concerning transgender rights are particularly well-suited for this task since anxieties often crystallise with particular clarity where minority rights are concerned. While the impact of gender norms is ubiquitous, their regulatory effect comes to the fore most violently in cases perceived as transgression, and it is those cases that I will be concerned with.

An analysis of various judgments dealing with legal gender recognition for transgender persons, particularly those of the European Court of Human Rights, will reveal what Alex Sharpe has long since dubbed a “judicial concern over transgender ‘authenticity’”: the experiences of transgender persons are not taken for granted, but rather subjected to scrutiny and required to conform to a particular form of narrative in order to achieve legal recognition. To formally ensure this alleged “authenticity”, different legal orders establish various preconditions such as the divorce requirement, sterilisation or other bodily modifications, and a psychiatric diagnosis of gender identity disorder. My hunch is that each of these requirements can be connected back to a form of anxiety: in particular, challenges to the sterilisation requirement have led to near-panicked reactions even by usually placid courts when faced with the idea of a woman procreating or a man giving birth. The presentation aims to substantiate this hunch in more detail and discuss its implications.